

IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

COMPLETE TITLE OF CASE

LAURENCE C. HAYS, II,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

DOCKET NUMBER WD77877

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: December 22, 2015

APPEAL FROM

The Circuit Court of Clay County, Missouri
The Honorable Larry D. Harman, Judge

JUDGES

Division II: Pfeiffer, P.J., and Hardwick and Welsh, JJ.

CONCURRING.

ATTORNEYS

Damien de Loyola, Assistant Appellate Defender
Kansas City, MO

Attorney for Appellant,

Chris Koster, Attorney General
Evan J. Buchheim, Assistant Attorney General
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Attorneys for Respondent.



MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

LAURENCE C. HAYS, II,)
)
 Appellant,)
v.) **OPINION FILED:**
) **December 22, 2015**
STATE OF MISSOURI,)
)
 Respondent.)

WD77877

Clay County

Before Division II Judges: Mark D. Pfeiffer, Presiding Judge, and Lisa White Hardwick and James Edward Welsh, Judges

Laurence C. Hays (“Hays”) was found guilty by a jury of three counts of statutory sodomy in the second degree for having deviate sexual intercourse with his fifteen-year-old biological daughter (“Victim”). After Hays’s convictions were affirmed on direct appeal, he filed a Rule 29.15 motion for postconviction relief. The Circuit Court of Clay County, Missouri (“motion court”), denied Hays’s motion after an evidentiary hearing. Hays appeals, asserting that trial counsel was ineffective for failing to cross-examine and failing to object.

AFFIRMED.

Division II holds:

1. Hays claims that trial counsel was ineffective for failing to adequately cross-examine Victim’s forensic interviewer on “The Child Sexual Abuse Accommodation Syndrome” (“CSAAS”). The record shows that the interviewer testified on direct examination that CSAAS is not a diagnostic tool but is “simply an educational paper” that describes five phases common among children who are sexually abused. Trial counsel was not ineffective in that there was no need for counsel to cross-examine the interviewer further about what she testified to on direct examination regarding CSAAS.

2. Hays claims that trial counsel was ineffective for failing to object to the testimony of the doctor who performed Victim’s forensic examination that Victim had been sexually

assaulted. Trial counsel's decision not to object and instead to aggressively attack the basis for her opinion during cross-examination does not constitute ineffective assistance.

3. Hays claims that trial counsel was ineffective for failing to object to the forensic interviewer's testimony recounting Victim's statements during a forensic interview. Trial counsel's reasonable trial strategy was to impeach Victim's testimony by eliciting prior inconsistent statements made by Victim to the forensic interviewer.

4. Hays claims that trial counsel was ineffective for failing to object to five statements during the State's closing argument. We conclude that trial counsel's failure to object was a matter of trial strategy and did not deprive Hays of a fair trial:

a. The prosecutor argued that the doctor had found, "beyond a reasonable doubt," that Victim had been sexually assaulted. The prosecutor's misstatement was brief and not repeated; the trial court had instructed the jury immediately prior to the closing arguments that the arguments were not evidence; any prejudice caused by the misstatement was further mitigated when trial counsel attacked the doctor's testimony in closing argument by arguing that the doctor found no physical evidence of sexual abuse and that she based her conclusion on information from Victim; and the prosecutor used the terms "reasonable doubt" and "reasonable degree of medical certainty" correctly in rebuttal argument.

b. The prosecutor argued that facts outside the evidence: that trial counsel was not a doctor. Comments directed at the tactics of defense counsel are permissible, and the prosecutor's argument was a response to trial counsel's personal opinions in closing argument marginalizing the doctor's opinion.

c. The prosecutor argued facts outside the evidence: that Hays used a racial epithet the first day he saw Victim. Hays testified that he expressed his views about "other" people to Victim on the first day he moved home. The prosecutor can argue the evidence, the reasonable inferences from that evidence, and the credibility of the witnesses; this was a proper commentary on the evidence.

d. The prosecutor argued that it was every defense lawyer's dream to have a client like Victim. The argument was not a personal attack on trial counsel; the prosecutor was responding in rebuttal to trial counsel's argument questioning Victim's credibility and was suggesting that Hays's arguments were not persuasive.

e. The prosecutor argued that no evidence was presented to the jury by anyone other than Hays to contradict the doctor's testimony that Victim was abused. The State may refer to a defendant's failure to offer evidence, so long as there is no reference to the defendant's failure to testify. Hays's defense was that the alleged sexual abuse did not take place; the prosecutor's argument pointed out to the jury an absence of evidence to support the theory relied upon by Hays.

Opinion by: Mark D. Pfeiffer, Presiding Judge

December 22, 2015

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